No. 10035.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE B. F. GOODRICH COMPANY, a corporation,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

Opinion Below.

The only previous opinion in this case is the memorandum opinion of the District Court, together with that included in the court's findings of facts and conclusions of law [R. 95-108, 140-156], which are not reported.

Jurisdiction.

This is an appeal from a judgment entered August 4, 1941, by the United States District Court dismissing the action, with costs, in favor of the appellee (hereafter called the United States or the Government) [R. 157-158] in a suit[1] filed by the appellant (hereafter called the taxpayer)

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[1]Appellant filed the present action pursuant to original and amended claims for refund filed by it and its predecessor in interest (the Pacific Goodrich Rubber Company) [R. 9-14, 16-20, 60-64, 67-72, 199-220], the appellant's wholly owned subsidiary [R. 82, 142-143], which assigned its claims against the United States to the appellant. [R. 3-5, 35-38, 52-56, 191-196.] All of the claims were rejected by the Commissioner of Internal Revenue in due course [R. 21, 72, 221-225], and this action followed.

for the recovery of additional manufacturers excise taxes and interest thereon in the aggregate amount of $16,-450.39, plus interest according to law, assessed against and paid under protest by the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest, for the months of November and December, 1933. [R. 2-25.] The action arose under the internal revenue laws of the United States (Section 602 of the Revenue Act of 1932, c. 209, 47 Stat. 169, as modified by Section 9(a) of the Agricultural Adjustment Act, c. 25, 48 Stat. 31), jurisdiction having been vested in the United States District Court under Section 24, subdivisions 5 and 20 of the Judicial Code. The case is brought to this Court by notice of appeal filed November 3, 1941. [R. 170.] The jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended.

Questions Presented.

1. Whether the assignments of its claims for refund against the United States made by the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest and its wholly owned subsidiary, were valid, or ineffective under Section 3477, Revised Statutes.

2. Whether the taxpayer is entitled to maintain the present action and to recover a refund since the grounds relied upon in the claims for refund and the original petition differ materially from the new and unrelated grounds relied upon in the present suit.

3. Whether the taxpayer established by proof, as required by Section 621(d) of the Revenue Act of 1932 in order to recover, that the tax in question was not passed on, or if passed on was repaid, to the ultimate vendees or

purchasers of the products of the Pacific Goodrich Rubber Company.

4. Whether the deduction or credit against the manufacturers' excise taxes (imposed by Section 602 of the Revenue Act of 1932), allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which *processing taxes* were imposed and paid pursuant to Section 9(a), applies also to cotton on which *floor stocks taxes* were imposed and paid pursuant to Section 16 of the Agricultural Adjustment Act.

Statutes and Regulations Involved.

The statutes and regulations involved are set forth in the Appendix, *infra,* pages 47-51.

Statement.

The facts, including documents (exhibits), were stipulated between the parties hereto[2] [R. 80-92, 159-160], and were found as facts by the District Court substantially as follows [R. 141-152]:

The taxpayer is a corporation organized under the laws of the State of New York and is qualified to do business in the State of California, having an office in Los Angeles and its principal office and place of business in Akron, Ohio. [R. 141.]

On June 20, 1927, the Pacific Goodrich Rubber Company, the taxpayer's predecessor in interest, was incorpo-

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[2]Most of the facts as stipulated between the parties hereto [R. 80-92, 159-160] were found by the court below as its findings of facts. [R. 141-152.] Other facts, taken from the stipulation of facts, were found by the court by reference [R. 152, par. XXIII] and have been substantially set forth hereinafter.

rated under the laws of the State of Delaware and was dissolved on or about December 21, 1934. [R. 141.]

The present action arose under the internal revenue laws[3] of the United States and was brought by the taxpayer for the recovery of additional manufacturers' excise taxes paid under protest by the Pacific Goodrich Rubber Company (hereafter called Pacific) to the then Collector of Internal Revenue.[4] [R. 141-142.]

On June 30, 1934, 8,000 shares of the capital stock of Pacific were issued and outstanding, and none of them were subscribed for but unissued; after that date the number of shares of stock of Pacific, which were issued and outstanding, remained unchanged; and at no time thereafter were any of the shares subscribed for but unissued. [R. 142.]

At all times from the date of the first issuance of stock of Pacific up to and including the date of its dissolution, all of the stock issued by Pacific was issued in the name of the taxpayer, or in that of trustees for the benefit of the taxpayer who was the owner thereof. [R. 142-143.]

Under the provisions of the Agricultural Adjustment Act,[5] Pacific was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary

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[3]Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 602, as modified by the Agricultural Adjustment Act, c. 25, 48 Stat. 31, Sec. 9(a). [R. 141.]

[4]The Collector died before the commencement of this action, and his successor in office still holds the position. [R. 142.] The present action was therefore brought by the taxpayer, appellant herein, against the United States of America. [R. 2.]

[5]Section 16 of the Agricultural Adjustment Act, c. 25, 48 Stat. 31. [Appendix, *infra.*] [R. 143.]

of Agriculture), in an amount equivalent to the tax which would have been paid on the cotton had it actually been processed after August 1, 1933, *i. e.*, $0.044184 per pound. Under that Act[6] also, Pacific was allowed to compute the manufacturers' excise tax on tires, levied by Section 602 of the Revenue Act of 1932 [Appendix, *infra*], by deducting from the weight of the tires the weight of processed cotton in the tires upon which a processing tax, including a floor stocks tax, had been paid under Section 9(a) or Section 16(a) of the Agricultural Adjustment Act. [Appendix, *infra.*] [R. 143.]

On August 1, 1933, Pacific held for sale or other disposition, articles processed wholly or in chief value from cotton, namely, tire fabrics, threads and other materials having a total cotton content of 782,474 pounds (such articles hereinafter being referred to as processed cotton). Pursuant to Section 16 of the Agricultural Adjustment Act, and the pertinent regulations of the Treasury established thereunder, Pacific duly prepared and filed with the then Collector of Internal Revenue for the Sixth District of California its return reporting the sale or other disposition of the above-mentioned 782,474 pounds of processed cotton and paid to the Collector taxes thereon at the rate of $0.044184 per pound, as duly fixed by the Secretary of Agriculture in the total sum of $34,648.08. The tax was paid in four installments on August 31, September 30, October 31 and November 30, 1933, in the respective amounts of $7,368.06, $7,368.06, $11,249.98 and $8,666.03. No portion of the tax of $34,648.08 has been refunded or credited to the taxpayer or to Pacific. [R. 143-144.]

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[6]Section 9(a) of the Agricultural Adjustment Act. [Appendix, *infra.*] [R. 143.]

During the period from August 1, 1933, through January 5, 1934, Pacific manufactured and sold tires (exclusive of tax-free tires sold to the Government for export) which contained 705,806 pounds of the above-mentioned 782,474 pounds of processed cotton which were held for sale or other disposition by Pacific on August 1, 1933. The remaining 76,668 pounds of processed cotton which Pacific held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires or wasted. [R. 144-145.]

In computing the manufacturers' excise taxes imposed by Section 602(1) of the Revenue Act of 1932, on the above-mentioned tires manufactured and sold by Pacific during the period from August 1, 1933, through January 5, 1934, Pacific deducted from the weight of the tires the weight of the 705,806 pounds of processed cotton contained therein on which it had already paid the tax imposed by Section 16 of the Agricultural Adjustment Act. The manufacturers' excise tax so computed was reported by Pacific by the filing of manufacturers' excise tax returns with the then local Collector of Internal Revenue, and the amount of the tax so computed, namely, the sum of 2¼ cents per pound on the weight of the tires less the weight of the processed cotton contained therein on which the tax imposed by Section 16 of the Agricultural Adjustment Act had been paid, was paid to the Collector. [R. 145-146.]

The computation of the manufacturers' excise tax was rejected and disallowed by the Collector, and on or about April 10, 1934, demand was made upon Pacific by the Collector for the payment of additional manufacturers' excise tax in the sum of $15,880.64, together with interest thereon in the sum of $569.74, which interest was assessed

against Pacific on June 9, 1934. The additional manufacturers' excise tax demanded of Pacific was a tax of 2¼ cents per pound on the 705,806 pounds of processed cotton on which Pacific had paid the tax imposed by Section 16 of the Agricultural Adjustment Act, and the weight of which, for the purpose of computing the manufacturers' excise tax, was deducted by Pacific from the weight of the tires manufactured and sold by it during the period from August 1, 1933, through January 5, 1934. In response to the Collector's demand, the additional manufacturers' excise tax of $15,880.64 was paid by Pacific on or about April 18, 1934, and the interest thereon of $569.74 was paid on or about July 27, 1934. The payments were made under written protest solely for the purpose of avoiding penalties and interest, and the Collector was so advised at the time of payment. The Collector, in arriving at the amount of the additional manufacturers' excise tax and the interest thereon to be demanded of Pacific, determined for their convenience that the additional tax should be demanded for the months of November and December, 1933, and Pacific did not object to this action if demand for an additional manufacturers' excise tax was to be made but did object to any additional taxes being demanded. [R. 146-147.]

On June 30, 1934, and August 14, 1935, Pacific assigned everything it had to the taxpayer, including all rights, claims and choses in action against others, and particularly in the assignment of August 14, 1935, its claim for refund of the additional manufacturers' excise taxes involved herein. [R. 148, 191-196, Exs. A and B.]

At the close of business on June 30, 1934, all the property and assets of Pacific had been delivered in kind to the taxpayer, as the sole owner of the former's stock, and

therefore its board of directors and stockholders held various meetings during that year for the purpose of ratifying such action as well as the first assignment of all its rights, claims and choses in action against others, and also to dissolve the Pacific corporation according to law. [R. 147-148, 226-233, Ex. I.] There was no ratification by the directors or stockholders [R. 226-233], however, of the second assignment of August 14, 1935, whereby Pacific was purported to have assigned particularly its claim against the United States for the refund of the manufacturers' excise taxes in question [R. 194-196, Ex. B], approximately eight months after its dissolution on December 21, 1934. [R. 234-235.]

On or about August 31, 1935, the taxpayer and Pacific each filed with the local Collector a claim for refund dated August 19, 1935, of the additional manufacturers' excise tax and interest thereon in the aggregate sum of $16,-450.39, which had been paid by Pacific under protest as described above. Each of the claims was made upon the ground, as alleged therein, that under Section 9 of the Agricultural Adjustment Act, Pacific, in computing the manufacturers' excise tax on the tires manufactured and sold by it, was entitled to deduct from the weight of the tires the weight of the processed cotton therein on which it had paid a floor stocks tax under Section 16 of the Agricultural Adjustment Act. As an additional reason for the allowance of the taxpayer's claim, it was alleged therein that it was entitled to the refund claimed by reason of the above-mentioned assignment of June 30, 1934, from Pacific. [R. 148-149.]

On or about April 21, 1936, the taxpayer and Pacific each filed with the Collector an amended claim for refund dated March 30, 1936, of the same tax and interest as

claimed in their original claims for refund. Each of the amended claims for refund alleged the same grounds for its allowance as those alleged in the original claims for refund, and each alleged the further reason for its allowance that Pacific had not included the tax, the refund of which was claimed, in the price of the articles on which the tax was imposed, nor had it collected the amount of the tax from the persons to whom the articles were sold. [R. 149.]

On May 22, 1936, the Commissioner of Internal Revenue, by letter addressed to the taxpayer, rejected in full both its original and amended claims for refund on the ground that there was on file in his office a claim filed by Pacific for the refund of the same tax, based on the same contentions, and that the taxpayer's claims were therefore duplicate claims. On April 8 and May 22, 1936, the Commissioner of Internal Revenue rejected Pacific's original and amended claims for refund, respectively. The rejections of the claims were made on the grounds that the proper interpretation of Section 9(a) of the Agricultural Adjustment Act did not entitle it to a credit for the floor stocks tax, paid on the cotton contents of tires, in computing the manufacturers' excise tax. No part of the additional manufacturers' excise tax and interest in the aggregate sum of $16,450.39, which was paid under protest by Pacific, has been repaid or refunded to the taxpayer or to Pacific, and no other action than the filing of the claims for refund and the bringing of this action has been brought or taken by the taxpayer or Pacific for the recovery of the tax and interest in question. [R. 149-150.]

On July 8, 1936, the taxpayer filed with the Collector of Internal Revenue at Akron, Ohio, a claim for abate-

ment of certain taxes and interest having no relation to the taxes and interest involved in this proceeding, but in which the taxpayer described itself as the successor to Pacific and in which it made the statement that Pacific transferred its assets to the B. F. Goodrich Company on or about June 30, 1934, and was dissolved on December 21, 1934. [R. 150-151.]

Throughout the period from August 1, 1933, to April 10, 1934, Pacific was informed and believed that, for the purpose of computing the manufacturers' excise tax on tires manufactured and sold by it, it was entitled, under the provisions of Section 9(a) of the Agricultural Adjustment Act, to deduct from the weight of the tires so sold, the weight of the processed cotton contained therein upon which a tax had been paid either under Section 9(a) or Section 16 of the Agricultural Adjustment Act. Pacific and the taxpayer at all times prior to April 10, 1934, believed that the tax burden with respect to such tires would amount to $0.044184 per pound on the processed cotton contained in their tires and to 2¼ cents per pound on the remaining weight of the tires. At no time during the period preceding April 10, 1934, did Pacific or the taxpayer contemplate that either of them would be compelled to pay an additional manufacturers' excise tax of 2¼ cents per pound on the weight of the processed cotton contained in such tires and on which a floor stocks tax had been paid under Section 16 of the Agricultural Adjustment Act. All tires containing processed cotton which were held for sale or other disposition by Pacific on August 1, 1933, were sold and billed to the purchasers or vendees of Pacific long before demand was first made by the Collector that it pay an additional manufacturers' excise tax of 2¼ cents per pound on the weight of the proc-

essed cotton contained in the tires, and after the additional tax had been demanded and paid, no additional billing was made to the purchasers or vendees and no additional amount was collected from them. [R. 151-152.]

The court below also found as facts, by reference [R. 152, par. XXIII], substantially the following facts[7] taken from the stipulation of facts entered into between the parties hereto [R. 80-92, 159-160]:

J. C. Herbert, if called as a witness, would have testified that as secretary and vice president of Pacific before its dissolution, he had charge of the corporate books and records [R. 81], and was familiar with the assets and affairs of Pacific. [R. 82.]

George Hubbell, if called as a witness, would have testified that as agent, cashier, auditor and/or assistant treasurer of Pacific at various times, he kept the books and records of Pacific showing the quantity and quality of articles—tire fabrics, thread and other materials—which were processed wholly or in chief value from cotton and held for sale on August 1, 1933; the quantity and type of tires Pacific manufactured from such articles from August 1, 1933, to January 5, 1934; the cotton content and the quantity of processed cotton contained and used in the manufacture of tires which comprised the articles processed from cotton and held for sale or other disposition by Pacific on August 1, 1933; the other items and matters relating to taxes paid by Pacific and its dealings under all the Revenue Acts and the Agricultural Adjustment Act of

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[7]These facts found by reference by the District Court [R. 152, par. XXIII] relate to the testimony two witnesses would have given if called to testify, as included in the stipulation of facts. [R. 81-92.] Only the portions thereof, which were not set forth by the court in its other findings but were found by reference, are given here in substance.

the United States [R. 83-84]; that he was familiar with and knew the prices at which Pacific sold its tires during the period herein; whether or not the prices at which Pacific sold the tires were included in the prices of the tires sold from August 1, 1933, to January 5, 1934; any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold by Pacific during such period; whether the prices at which Pacific sold tires during such period, containing the processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were any greater than the prices at which it sold tires containing processed cotton on which a tax was payable under Section 9(a) of that Act; whether any additional billing was made to customers and/or vendees who purchased tires during that period after the assessment of the taxes here in question [R. 85]; that Pacific did not include or intend to include in the prices of its tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during that period; and that the prices at which Pacific sold the tires during that period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which it sold the tires containing processed cotton on which a tax was payable under Section 9(a) of that Act. [R. 91.]

On the basis of the foregoing facts, the court below concluded as a matter of law and held that Pacific was

entitled to have computed the manufacturers' excise tax in question on the basis of the weight of the tires manufactured and sold by it, less the weight of the processed cotton therein on which processing or floor stocks taxes had been paid, and therefore the tax in question was erroneously and illegally collected and Pacific is entitled, as the actual taxpayer, to the refund thereof [R. 153-155]; that the taxpayer, the successor in interest to Pacific, did not have the right to the refund of the taxes in question because of its ownership of all the stock of Pacific or the dissolution and distribution of all of Pacific's assets in kind to the taxpayer, but solely because of the assignments made by the former to the taxpayer; that in so far as the assignments purported to assign Pacific's refund claims against the United States to the taxpayer, they were null and void *ad initio* under Section 3477, Revised Statutes, and therefore the taxpayer acquired no rights to the refund of the taxes sought to be recovered herein; and, furthermore, that the taxpayer had failed to establish that the taxes in question had not been passed on to the vendees or purchasers of the products of Pacific, within the meaning and requirements of the pertinent statutes. [R. 155-156.] The court thereupon gave judgment in favor of the United States, with costs, and decreed that the taxpayer take nothing. [R. 157-159.] From the judgment so entered, the taxpayer appealed to this Court. [R. 170.]

Summary of Argument.

1. Pacific's two assignments purporting to transfer its claims for refund of manufacturers' excise taxes against the United States to the taxpayer were not executed in the presence of at least two attesting witnesses *after* the allowance of such claims, the ascertainment of the amount due and the issuance of a warrant for the payment thereof by the Commissioner of Internal Revenue, nor did they recite any warrant for payment or acknowledgment by a proper officer who had certified at the time of making the assignments that he had read and fully explained them to the person acknowledging them. The assignments were therefore ineffective to permit the taxpayer to bring this suit under the specific terms of Section 3477, Revised Statutes. The refund claims were not distributed in kind to the taxpayer upon Pacific's dissolution and therefore by operation of law at the end of 1934 for the reason that the taxpayer had acquired its right to the chose in action by the first voluntary assignment for a consideration several months before the dissolution, and that assignment was ineffective under Section 3477, as heretofore stated. The claims could not have been passed on to the taxpayer, as the beneficial owner upon Pacific's dissolution at the end of 1934, by operation of law. It follows that, under Section 3477, Revised Statutes, the taxpayer could not properly maintain the present action and is not entitled to recover.

2. The grounds first advanced in the taxpayer's amended petition and relied upon herein are new, unrelated and materially and fatally different from those originally included in the claims for refund filed with and considered and rejected by the Commissioner of Internal

Revenue to the end that that official was not apprised thereof. The original claims were based on a claimed recovery under Section 9(a) of the Agricultural Adjustment Act and also because of the assignment of June 30, 1934, and the amended claims were based on the same grounds and on the further ground that Pacific had allegedly not passed the taxes in question on to its vendees. Not until the filing of the taxpayer's first amended petition, however, when it was too late to have filed further claims, did the taxpayer attempt to enlarge upon the grounds set forth in the refund claims by alleging the new grounds now relied upon, namely, that its right to recovery was based on its sole ownership of Pacific's capital stock and the succession to its assets by operation of law, and also because of the two assignments The Government has not waived the necessity of the taxpayer's literal compliance with the statutory and regulatory requirements that the bases relied upon in suit must be the same as those set forth in the refund claims of which the Commissioner was apprised and upon which he acted, and it is settled that claims for refund based on a particular ground may not form the basis for a suit claiming recovery upon an entirely different ground. Under the regulations and authorities, therefore, the taxpayer is not entitled to maintain the present action or to recover any refund.

3. We have already shown that the assignments relied upon by the taxpayer did not cause the taxpayer to succeed to Pacific's claims for refund by operation of law. Under the facts herein, *Pacific* was "the person who paid the tax" and therefore, under the pertinent statute and regulations, Pacific alone was entitled to maintain the present action and, upon sufficient proof in accordance

with the specific requirements of the statute and regulations, to recover.

At all events, the taxpayer is not entitled to recover in the absence of proof that Pacific did not pass the taxes in question on to its vendees. The proof (testimony of Pacific's former employee) submitted by the taxpayer to the effect that Pacific did not pass the taxes on to the purchasers as part of the price of the tires manufactured and sold to them was properly objected to by the Government as being insufficient on the grounds that it was not the best evidence. Pacific's books of accounts and sales records, showing in fact whether or not the taxes in question had been included in the sales prices of the tires with respect to which they were imposed, would have been the best evidence but no explanation was given by the taxpayer for its failure to have produced such vital records and data. Since the taxpayer failed to meet the specific requirements of the statutes and regulations, therefore, it was not entitled to maintain the instant action for the recovery of the manufacturers' excise taxes in question.

It is clear too that the court below, upon a hearing and full consideration, did not abuse its discretion in denying the taxpayer's motion to reopen the case and submit further proof. The record (affidavits accompanying the motion) indicate that the taxpayer could not have produced any new and material proof beyond that already stipulated between the parties hereto and submitted to the court upon the trial of the case. It is settled that the granting or refusing to grant a motion for rehearing on a new trial rests in the sound discretion of the court to which the motion is addressed and such action is reviewable only in case of abuse, not shown herein.

4. The deduction or credit against manufacturers' excise taxes imposed by the 1932 Act, allowed by the Agricultural Adjustment Act on cotton on which *processing taxes* were imposed by Section 9(a) thereof, does not apply also to cotton on which *floor stocks taxes* were imposed by Section 16 of that Act. Section 9(a) and (d)(2) of the latter Act defines "processing taxes" as a tax on the processing of various articles (cotton herein), and makes a specific provision for a credit therefor, against sales taxes, to the extent that the processed taxed article has been included in the finished taxed product. Section 16 of that Act, however, imposes but does not define floor stocks taxes which are taxes on the possession of various articles (cotton herein) held for sale, and makes no provision for a credit for such taxes, against sales taxes, to the extent that the initially taxed article has been included in the finished taxed products. It is clear that no provision for a floor stocks tax credit may be read into that section by implication or inference, merely because such a credit appears in Section 9(a) for processing taxes, lest there be added something entirely new, not in the statute, to the meaning of the word "processing" as defined in the statute. There is nothing in the statute to indicate or imply that the floor stocks tax as used in Section 16 may properly be used interchangeably with or in lieu of the "processing tax" as used in Section 9(a) of the Act. Allowance of such a credit for floor stocks taxes is a matter of legislative grace, and since it is not provided for—as is the processing tax—in the terms of the statute and the claim for the allowance thereof is a claim to exemption, the taxpayer must bring itself squarely within the express terms of the statute. This the taxpayer has failed to do, and it is therefore not entitled to recover or to any refund.

ARGUMENT.

I.

The Assignments of Its Claims for Refund Against the United States Made by Pacific to the Taxpayer Were Ineffective Under Section 3477, Revised Statutes, and Therefore the Taxpayer Could Not Properly Maintain the Present Action and Is Not Entitled to Recover.

Since decision of this issue adversely to the taxpayer, in harmony with the decision of the court below, would be determinative of the entire case and foreclose the taxpayer's recovery of the taxes in dispute, it is dealt with first.

The court below stated, in respect to the two assignments made by Pacific to the taxpayer, that the latter's claim herein to the right of action and recovery of the taxes in question was, in the original petition filed October 1, 1937 [R. 2-25], based solely on the two assignments; that not until almost two and one-half years later, when it subsequently filed its first amended petition on February 5, 1940 [R. 50-78], did the taxpayer assert its right to recover on the grounds—which, the court stated, were at variance with its claims for refund based solely upon the assignments [R. 102]—that it was the sole stockholder of Pacific and succeeded to Pacific's right to recover by operation of law upon the latter's dissolution on December 21, 1934; that the only authenticated claim[8] in the record

[8]The claim referred to was a claim for the abatement of certain taxes not involved herein [R. 238-252, Ex. 3], filed by the taxpayer on July 8, 1936, with the Collector of Internal Revenue, Akron, Ohio, in which it described itself as the successor to the Pacific Goodrich Rubber Company and made the statement that it was the taxpayer by reason of the transfer of Pacific's assets to it, the assignment of June 30, 1934, and the dissolution of Pacific on December 21, 1934 [R. 104, 150-151, par. XXI.]

that the taxpayer is the taxpayer by reason of the assignment of June 30, 1934, and the dissolution of Pacific on December 21, 1934, does not materially alter the taxpayer's previous position based on the two assignments consistently adhered to until the exigency of avoiding the consequences of the statute relating to assigned claims against the United States [Section 3477, Revised Statutes, Appendix, *infra*] became imminent; and consequently, it concluded as a matter of law and held that the chose in action did not lodge in the taxpayer because of its sole ownership of Pacific's stock on the dissolution of that corporation at the end of 1934, but solely by reason of the two assignments which were executed voluntarily by the two corporations for expressed valuable considerations; and therefore the taxpayer's status as a claimant against the United States is clearly within the provisions of Section 3477, Revised Statutes. [R. 103-105, 155.]

While the taxpayer claimed before the court below in the original petition—based on the ground set forth in the claims for refund rejected by the Commissioner—that it was entitled to maintain the instant action and recover the taxes in question on the basis of the assignment in question, it now contends that the distribution in kind by Pacific, pursuant to its dissolution, was a transfer by operation of law, that the taxpayer therefore, as transferee by operation of law and sole stockholder of the dissolved corporation, could properly maintain this suit for refund, and that if the right to the refund did not pass by the assignment, it passed automatically upon Pacific's

dissolution to the taxpayer, its sole stockholder.[9] (Br. 17-34.)

We submit that Pacific's claims for refund against the United States were not transferred to the taxpayer by operation of law under circumstances herein; that the assignments in question wholly failed to comply with the requirements of Section 3477, Revised Statutes, and they were therefore ineffective under that statute; and that the taxpayer acquired no rights thereunder to the refund of the taxes paid by Pacific and sought to be recovered herein, as the court below held. [R. 103-105, 155.]

Section 3477, Revised Statutes (31 U. S. C., Section 203) provides that all transfers or assignments of any claim upon the United States—

> * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing a warrant for the payment thereof. Such transfers, [and] assignments * * * must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, [or] assignment * * * to the person acknowledging the same. * * *

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[9]The taxpayer's present contentions were asserted for the first time upon its filing the first amended petition below [R. 50-75], almost two and one-half years after filing the original suit. [R. 2-25.] We contend this is a fatal variance from the basis of the refund claims, submitted to, acted upon and rejected by the Commissioner of Internal Revenue, which formed the basis for the original petition, as shown hereinafter under Point II.

None of the foregoing statutory requirements was met in the instant case. In the first place, contrary to the taxpayer's contention, the claims for refund in question were not distributed in kind either by Pacific's assignment of June 30, 1934, or by the second assignment of August 14, 1935, to the taxpayer upon the former's dissolution on December 21, 1934, and therefore by operation of law. The reasons therefor are that the first assignment, made six months before Pacific's dissolution, could not have been a distribution according to the resolutions of the directors and the stockholders pursuant to dissolution. It was merely a voluntary assignment for a consideration [R. 105, 191], having no possible relation to the subsequent dissolution. The assignment was effective as between the parties to give the taxpayer the right of any potential chose in action against the United States so that the subsequent dissolution did not distribute this claim in kind. This assignment, however, was ineffectual in so far as the right to maintain this suit was concerned because of the specific provisions of Section 3477, Revised Statutes. The claims were not filed until August 31, 1935,[10] and April 12, 1936,[10] [R. 199-202, 204-208, 209-214, 215-220], and therefore they had not yet come into being as formal statutory claims for refund asserted against the United States at the time the proposed assignments thereof were allegedly made by

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[10]The original and amended claims for refund were dated August 30, 1935, and March 30, 1936, but they were not filed with the Collector of Internal Revenue until August 31, 1935, and April 21, 1936, respectively. [R. 209-214, 215-220.]

Pacific, and the attempted assignment of a potential chose in action, unascertained as to amount or allowance, clearly would come within the specific prohibition of Section 3477, Revised Statutes.

The taxpayer argues (Br. 33-34) that if the first assignment of June 30, 1934, because it was made prior to dissolution of Pacific, did not effect a transfer of the claim against the United States by operation of law, then at all events the second assignment of August 14, 1935, of this particular claim was unqualifiedly a distribution of this asset in kind to the taxpayer. It is our view, however, that the second assignment had no effect whatever for the reason that any right of the taxpayer to the claim against the United States had arisen upon the first assignment for a consideration, which was ineffectual because of Section 3477, Revised Statutes, and for the further reason that the second assignment occurred long after the dissolution. Since Pacific, upon dissolution on December 21, 1934, had "neither *de jure* nor *de facto* existence and is as legally extinct as a dead man," as taxpayer admits (Br. 19), and the second assignment and the claims for refund were not made against the United States—ostensibly by Pacific, an extinct corporation—until a year or so thereafter, it necessarily follows, of the taxpayer's own admission, that Pacific was without existence and therefore without power to have made or assigned a lawful or valid claim against the United States. The second assignment of August 14, 1935 [R. 194-196], allegedly assigning Pacific's claim against the United States to the

taxpayer, could not have been made by an extinct corporation. It is apparent, therefore, that the claims in question could not have been distributed upon Pacific's dissolution at the end of 1934 to the taxpayer, its sole stockholder, by operation of law. The second assignment, ostensibly made by Pacific, was not made until after its extinction as a corporation, and the two refund claims, ostensibly made by Pacific after dissolution, were not in existence until long thereafter. Consequently, contrary to the taxpayer's contentions, the dissolution of Pacific could not have effected a transfer of its claims to the taxpayer as the beneficial owner thereof by operation of law or otherwise.

There are other requirements of the statute (Section 3477, Revised Statutes) not met by the taxpayer. Thus, the statute calls for two attesting witnesses, whereas the assignment of June 30, 1934, relied on almost entirely herein by the taxpayer[11] (Br. 19), contained an attestation by Pacific's secretary. [R. 103.] While the second assignment did contain two attesting witnesses [R. 195], it nevertheless was made after the corporation had become extinct, and therefore was without binding effect. Even more fatal is the fact that the refund claims, at the time the proposed assignments were supposedly executed

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[11]The taxpayer relies almost entirely on the first assignment of June 30, 1934 (Br. 19), but contends, apparently alternatively, that if it was ineffectual in effecting distribution upon dissolution of Pacific almost six months later, then the taxpayer relies on the later assignment of August 14, 1935. Since the taxpayer admits, however, that Pacific was completely extinct as a corporation upon its dissolution on December 21, 1942 (Br. 19), the second alleged assignment made eight months later could have had no validity, as heretofore shown.

by an extinct corporation, had neither been allowed nor ascertained as to the amount finally to be due Pacific upon the allowance thereof, nor had a warrant been issued for the payment thereof. [R. 105.] These are specifically required by the terms of the statute *before* such an assignment may be legally made in the presence of two attesting witnesses, as the court below held. [R. 103-105, 155.] Finally, the assignments in question did not "recite the warrant for payment" and were not certified before the maker by a competent officer who made it appear in his certificate that he "at the time of the agreement, read and fully explained the transfer, [or] assignment * * * to the person acknowledging the same," as required by the statute.

The taxpayer seeks to avoid the effect of its obvious noncompliance with Section 3477 by arguing that the general purpose of the statute is to prevent frauds on the Treasury, and authorities are cited to that effect. (Br. 24-33.) Those cases are either distinguishable or stand for the general proposition, substantially, that the successor corporation has the right to maintain suit for the recovery of taxes paid by its predecessor where the plaintiff was shown by authorized union to have fallen heir to the predecessor's claim against the United States through consolidation, reorganization, liquidation, etc., thereby becoming the successor in interest, and consequently Section 3477 was held inapplicable. But taxpayer herein is not shown to have been the actual successor to Pacific's claim against the United States other than by the statements

in the totally unrelated abatement claim which it filed in Akron, Ohio [R. 151, 239-256, Ex. 3, 4], it having actually succeeded to the claim in question, through the first assignment for a good and valuable consideration and therefore, running counter to the provisions of Section 3477, it was not entitled to maintain the present action, as the court below held. [R. 104, 106-107.] However that may be, we respectfully submit that the statute should be applied to the instant case in which there was a complete failure to comply with each of the statutory requirements, regardless of the absence of any element of fraud upon the Treasury. Cf. *National Bank of Commerce v. Downie,* 218 U. S. 345; *Spofford v. Kirk,* 97 U. S. 484; *Manhattan Commercial Co. v. Paul,* 216 N. Y. 481. Thus, in *The John Shillito Co. v. McClung,* 51 Fed. 868 (C. C. A. 6th), the court held that the assignment of an unliquidated claim for customs duties alleged to have been illegally exacted is void under the statute. It may be observed that although taxpayer characterizes the cases it cited as holding the statute applicable to assignments by operation of law under circumstances comparable to those in the case at bar, none of the cases relied upon excuses total contravention of all the statutory requirements in a situation similar to that involved in the instant case, and it has already been shown that the claims for refund, born long after Pacific's dissolution, were not inherited by taxpayer by operation of law or otherwise.

II.

The Taxpayer Is Not Entitled to Maintain the Instant Action and to Recover a Refund Because the Grounds Relied Upon in the Claims Filed by Pacific With the Collector and Alleged in the Original Petition Differ Materially From the New and Unrelated Grounds Relied Upon in the Present Suit.[12]

As the court below stated, there is a variance between the grounds relied upon by the taxpayer and Pacific in the rejected claims for refund[13] on which the taxpayer's right of recovery was based solely on the two assignments, as in the original petition [R. 2-25], and the new grounds set forth for the first time in the taxpayer's first amended petition, filed two and one-half years later. [R. 50-78.] In the latter, the taxpayer based its claim to recovery of the tax in question on the grounds of its sole ownership of Pacific's stock and that if it did not succeed to Pacific's right to recover by reason of the two assignments originally relied upon, then it succeeded thereto by operation of law upon the distribution of Pacific's assets in June, 1934, and its dissolution in December, 1934. [R. 102.] The court held, however, that while there must be literal

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[12]While this point was not urged by the Government in the court below, it is settled that the Government is free to sustain its case upon any legal ground which will support it. *LeTulle v. Scofield*, 308 U. S. 415, 421, 422; *United States v. Ryerson*, 312 U. S. 260. The filing of a timely claim for refund is, of course, a prerequisite to the maintenance of a suit. *United States v. Felt & Tarrant Co.*, 283 U. S. 269.

[13]The claims filed by the taxpayer were summarily rejected by the Commissioner because they were merely duplicate claims of those filed by Pacific, containing the same basis for the recovery of the same tax. [R. 149-150.] Since the taxpayer apparently relies no further on them, we have not dealt with them herein.

compliance with the statutory requirements that a claim be filed before suit may properly be brought for a tax refund and the Treasury Regulations require that claims for refund specify in detail each ground upon which they rely, as well as facts sufficient to apprise the Commissioner of the exact basis thereof [Treasury Regulations 46, Article 71, Appendix, *infra*]; such requirements were in effect waived herein by the Commissioner's rejecting all the claims on the broad ground that neither the taxpayer nor Pacific had a right to a refund under the Commissioner's interpretation of Section 9(a) of the Agricultural Adjustment Act [Appendix, *infra*], without insisting upon their literal compliance with the requirements of the Regulations. [R. 103.]

We submit, however, that the grounds first advanced in the amended petition and relied upon here, were new, unrelated and materially and fatally different from those included in its claims for refund filed with the Collector and rejected by the Commissioner to the end that the Commissioner was not apprised of the exact basis thereof and consequently, under the Regulations and authorities cited hereafter, the taxpayer is not entitled to recover.

Thus, in the original claims for refund filed by the taxpayer and Pacific on August 31, 1935, it was claimed that they were entitled to recover under Section 9(a) of the Agricultural Adjustment Act and, additionally, in the taxpayers' claim that it was entitled to recover because of the assignment of June 30, 1934. [R. 148-149, 199-202, 209-214.] In the amended claims filed on April 21,

1936, they made the same claims for the same taxes and interest as originally claimed, and further that Pacific had not passed the taxes in question on to the vendees. [R. 149, 204-208, 215-220.] Not until the first amended petition[14] was filed on February 5, 1940—without having timely filed any further claims for refund, setting forth the new grounds relied upon herein[15]—was the basis set forth in the refund claims attempted to be enlarged upon by the allegations that the taxpayer's right to recovery was based on its sole ownership of Pacific's assets and its capital stock, and also because of the two assignments of June 30, 1934, and August 14, 1935. [R. 50-78.]

Thus the taxpayer is now relying on entirely different and unrelated grounds from those set forth in the claims for refund which were considered and rejected by the Commissioner. We therefore deny the correctness of the holding of the court below that the Commissioner's rejection of the claims had effected a waiver of his right to insist that the grounds asserted in the suit correspond to

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[14]At the time of filing the first amended petition on February 5, 1940, it was too late to have filed further claims setting forth the new bases now relied upon for the reason that the taxes were paid in 1934 [R. 146], and the law and authorities require that claims for the refund of excise taxes must be filed within four years after payment of such taxes (Section 3313, I. R. C.); and that valid amended claims setting forth new and unrelated grounds from those included in the original claims must be filed before the expiration of the statute of limitations. *United States v. Andrews*, 302 U. S. 517; *United States v. Garbutt Oil Co.*, 302 U. S. 528.

[15]While it was stipulated between the parties hereto that the petition and the amendment thereto may be amended in the particulars as set forth in the taxpayer's first amended petition [R. 78, par. (a)], that was merely an agreement to the amendment as filed and not an admission of the truth of the allegations set forth therein. This is shown by the further stipulation that the defendant's answer, denying the taxpayer's allegations in the original petition [R. 41-48], was deemed to be equally an answer to those in the amended petition. [R. 78-79, par. (b).]

those asserted in the claims. No waiver was effected by the rejection of the claims on the ground that no right of refund existed in the taxpayer or Pacific.

It is settled that a claim for refund based on a particular ground may not form the basis for suit claiming recovery of taxes upon an entirely different ground. *United States v. Felt & Tarrant Co.,* 283 U. S. 269 (holding that refund claims based upon the application for special assessment of profits tax did not form the basis for a suit claiming depreciation of patents); *Real Estate Title Co. v. United States,* 309 U. S. 13. This Court has so held. *United States v. Burns,* 114 F. (2d) 1023. In *United States v. Felt & Tarrant Co., supra,* the Supreme Court stated (pp. 272-273):

> One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, *Nichols v. United States, supra,* p. 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed "to protect all possible legal right of the taxpayer." The claim for refund, which §1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

The Court of Claims, in allowing recovery, relied upon *Tucker v. Alexander*, *supra*, and upon the fact that, at the time when respondent filed its return and its claim for refund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in *Tucker v. Alexander* the right of the Government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The Court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and "they mark the conditions of the claimant's right." *Rock Island R. R. v. United States,* 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, *Tucker v. Alexander, supra;* but it

> is not within the judicial province to read out of the statute the requirement of its words. *Rand v. United States,* 249 U. S. 503, 510.

Likewise in the present case there was no compliance with the statute, nor was there a waiver of its condition as there was in *Tucker v. Alexander,* 275 U. S. 228, since the Commissioner had not been advised, in the claims for refund, of the new grounds relied upon in the taxpayer's first amended petition, and consequently could have taken no action with respect thereto. While the rules laid down by the Supreme Court in the *Felt & Tarrant Co.* case have not been strictly adhered to by all of the courts, departure therefrom has been principally in cases involving materially different facts (such as, for example, where the grounds relied upon in the suit were *substantially* the same as those set forth in the refund claim (*United States Paper Exports Ass'n v. Bowers,* 6 F. Supp. 735 (S. D. N. Y.), reversed on another ground, 80 F. (2d) 82 (C. C. A. 2d)), or in those cases decided prior to the Supreme Court's decision in the *Felt & Tarrant Co.* case. Failure of the Government to have expressly asserted in the answer that the taxpayer's claims were insufficient to support the grounds alleged in the first amended petition was not a waiver by the Government. *Aladdin Co. v. Woodworth,* 43 F. (2d) 150 (Mich.).

III.

The Taxpayer Is Not Entitled to Recover Since It Was Not "the Person Who Paid the Tax," nor Has It Established by Requisite Proof That Pacific, the Real Taxpayer, Did Not Pass the Taxes in Question on to Its Vendees, as Required by the Statute and Regulations in Order to Recover.

The court below held that the taxpayer failed to bring itself strictly within the terms and requirements of Section 621(d) of the Revenue Act of 1932 [Appendix, *infra*] as "the person who paid the tax" since it was a corporate entity separate from Pacific, the actual corporate taxpayer; that Pacific paid the tax while it was conducting business under its own name and in its own capacity, filed its own tax returns, paid under protest, upon demand, the taxes in question partly before and partly after the assignment of June 30, 1934, and claimed the right to the refund of the portion thereof which is the subject matter of the instant action; and that the assignments relied upon by the taxpayer herein recite that they were made for good and valuable consideration inuring to Pacific, the record not showing what items made up such consideration. It held further that the taxpayer is conclusively barred from recovery for it failed to meet the requisite burden of proving that the taxes in question had not been passed on by Pacific to its vendees. [R. 105-108.]

The statute and regulations require that before a refund of manufacturers' excise taxes may be made pursuant to court decision or otherwise, "the person who paid the tax" must establish, as required by the Commissioner's regulations, that (1) "he has not included the tax in the price of the article in respect to which it was imposed, nor

collected the amount of the tax from the vendee or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund." Section 621 (d), Revenue Act of 1932; Regulations 46, Art. 71.[16]

(a) The Taxpayer Was Not "the Person Who Paid the Tax" and Therefore May Not Recover.

The taxpayer admits that the phrase "the person who paid the tax" has not been previously construed by the courts. It contends, however, that since it, as transferee or assignee by operation of law of the person who paid the tax herein, is not within the prohibition of Section 3477 of the Revised Statutes, it as such an assignee by operation of the law must be regarded as the person who paid the tax under Section 621(d) of the 1932 Act.[17] (Br. 56-67.)

We have already shown, however, that the taxpayer did not succeed to Pacific's right of action herein by operation of law but, solely through the instrumentality of the first assignment given for adequate and valuable consideration

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[16]Substantially the same requirements are set forth in the Revenue Act of 1936, c. 209, 47 Stat. 1648, as conditions requisite for the allowance of refunds of taxes collected under the Agricultural Adjustment Act pursuant to court decision or otherwise (Section 902(a) and (b)), cited by the taxpayer as an analogous statute under which relief has been given to transferees and assignees. (Br. 57-59.) That statute, however, can have no application herein since it permits refunds of such taxes only if the claim therefor was filed after its enactment on June 22, 1936, and prior to July 1, 1937 (Section 903), whereas the taxpayer's and Pacific's claims for refund were filed on August 31, 1935, and April 21, 1936 [R. 148-149], for manufacturers' excise taxes collected under Section 602 of the 1932 Act. [Appendix, infra.] The authorities cited by the taxpayer in connection therewith (Br. 58-62), therefore, have no relevancy or application herein, as the court below stated. [R. 101.]

[17]G. C. M. 21058, 1939—1 Cum. Bull. (Part 1) 280, on which the taxpayer relies (Br. 56-57), applies to refunds of taxes, collected under the Agricultural Adjustment Act, allowed to be made under the conditions specified in Sections 902-903 of the 1936 Act, and therefore has no application herein. See fn. 16, *supra*.

—the specific items comprising which are not shown by the record [R. 105]—flowing from taxpayer to Pacific, as the court below properly held [R. 107]; and therefore the taxpayer may not claim the right of action as transferee, assignee or otherwise, for the recovery of the excise taxes here in question paid by another taxpayer, a separate and distinct corporate entity. We have also shown that the assignments were expressly prohibited and rendered ineffective by the provisions of Section 3477 of the Revised Statutes. Therefore, Pacific alone was entitled to sue for the tax. But even if Section 3477 of the Revised Statutes did not bar this suit, the taxpayer cannot recover because Section 621(d) imposes another requirement, namely, that a refund shall be allowed only to the person who paid the tax.

Pacific alone was "the person who paid the tax," entitled to maintain the action and, upon sufficient proof in accordance with the specific requirements of the statute and regulations, to recover. Section 621(d), 1932 Act; Regulations 46, Art. 71. A transferee is not the person who paid the tax. In *Cowpens v. United States* (W. D. S. C.), 15 A. F. T. R. 794, affirmed on other grounds 79 F. (2d) 553 (C. C. A. 4th), it was held that the plaintiff corporation which acquired the stock of the taxpayer corporation for cash and a small amount of stock without any reorganization of the taxpayer corporation, was not entitled to recover. *Dalton Foundries v. United States,* 56 F. (2d) 483 (C. Cls.). *Cf. Keith v. Woodworth,* 115 F. (2d) 897 (C. C. A. 6th) (denying recovery of the taxes

paid by another corporation); *Ungar v. Higgins,* 27 F. Supp. 904 (S. D. N. Y.) (holding a judgment creditor of the taxpayer could not maintain the suit for recovery); *cf.* also, conversely, *Lion Coal Co. v. Anderson,* 62 F. (2d) 325 (C. C. A. 10th) (holding that the payment made by a transferee, even though paid under protest, was not recoverable in the absence of a showing that the transferee was not liable for the tax); *Central Aguirre Sugar Co. v. United States,* 2 F. Supp. 538 (C. Cls.) (holding a transferee corporation which made a voluntary payment of taxes due from its transferor was not entitled to recover); *Charles A. Zahn Co. v. United States,* 6 F. Supp. 317 (C. Cls.) (holding a suit filed after the expiration of the period for which the corporation was continued under the state statute could not be maintained); and *Western Knitting Mills v. United States,* 2 F. Supp. 119 (C. Cls.) (holding that the corporation was not entitled to recover in a suit against the United States for an amount of a refund paid to its successor).

(b) The Taxpayer Is Not Entitled to Recover in the Absence of Proof That Pacific Did Not Pass the Taxes in Question on to Its Vendees.

The court below held that the taxpayer's failure to have sustained the statutory burden of proving the crucial issue that Pacific did not pass the taxes in question on to its vendees was, under the facts herein, an insuperable barrier to its recovery of any refund. [R. 107-108.]

The taxpayer contends that the former employees who kept the books of Pacific were competent to testify that

the additional taxes in question were not included in the sales prices of the articles in respect to which they were imposed, and that therefore the court below erred[18] in denying relief on the sole ground that the person who paid the tax (Pacific) had not *itself* established the necessary facts required as proof under the statute. (Br. 66-67.)

We submit, however, that the court below correctly held that the taxpayer failed to meet the statutory burden of establishing that the taxes in question were not passed on by Pacific to its vendees as a part of the prices of the tires manufactured and sold by it during the period involved herein, or if passed on, that it paid the amount thereof to the ultimate purchasers, as required by the statute and regulations (Section 621(d) of the Revenue Act of 1932; Article 71 of Treasury Regulations 46) in order that recovery may be had.

In this connection, the Government entered into a stipulation—with a reservation as to its sufficiency [R. 136-

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[18]The taxpayer also contends (Br. 69-74) that the court below abused its discretion in denying its motion, supported by several affidavits, to reopen the case and admit further proof on this issue. [R. 110-135.] The record shows, however, that the motion was properly opposed by the Government [R. 136-139] and upon a showing that the taxpayer had already submitted in evidence a stipulation of facts entered into between the parties hereto [R. 80-92] that its witnesses, if called, would testify substantially to the same proof as was sought to be submitted by the motion to reopen the case, the court, upon a hearing had thereon, rendered an oral opinion and denied the motion. [R. 139-140.]

It is settled that the granting or refusing to grant a motion for rehearing or a new trial rests in the sound discretion of the court or tribunal to which the motion is addressed, and the action taken therein is reviewable only in case of abuse shown. *Newcomb v. Wood,* 97 U. S. 581, 583-584; *Railway Company v. Heck,* 102 U. S. 120; *Holmgren v. United States,* 217 U. S. 509, 521. Since it is plain from the record [R. 136-139] that the taxpayer could have adduced no new and/or material proof beyond that already stipulated between the parties and submitted to the court at the trial of the case [R. 80-92, 159-160], there was clearly no abuse when the court, upon a hearing and full consideration, in its sound discretion denied the motion.

138]—with counsel for the taxpayer [R. 80-92] that a former employee (one Hubbell, cashier and auditor) of Pacific, if called as a witness, would have testified substantially that he was familiar with, supervised, controlled and kept the books and records of Pacific during the period here in question and knew the prices at which Pacific sold the tires at all times applicable herein; that during the period from August 1, 1933, to January 5, 1934, Pacific neither included nor intended to include in the price of the tires sold during that period any amount to cover any excise taxes on the processed cotton contained in the tires manufactured and sold by it during that period; and that the prices at which Pacific sold its tires during the period in question were no greater for tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act [Appendix, *infra*] than the prices at which it sold tires during the same period containing processed cotton on which a tax was payable under Section 9 of that Act. [R. 83-84, 85, 91.]

This was substantially the entire evidence relied upon by the taxpayer in an attempt to establish that the taxes in question had not been passed on by Pacific in the sale of its tires to the vendees. No books of account or sales records were produced showing, in fact, whether or not the taxes in question were included in the prices of the tires with respect to which they were imposed—proof definitely required by the statute and regulations—and no explanation was given by the taxpayer for failure to have produced such vital records and data. The taxpayer's

only offer of proof, therefore, consisted merely of the statements of one of Pacific's former employees. This was insufficient to show that the tax had not been passed on. *Cudahy Packing Co. v. United States,* 126 F. (2d) 429 (C. C. A. 7th); *United States v. H. T. Poindexter & Sons Merchandise Co.* (C. C. A. 8th), decided June 30, 1942 (1942 P. H., par. 62852); *Luziers, Inc., v. Nee,* 106 F. (2d) 130 (C. C. A. 8th), certiorari denied 309 U. S. 660; *Honorbilt Products, Inc., v. Commissioner,* 119 F. (2d) 797 (C. C. A. 3d); *United States v. Jefferson Electric Co.,* 291 U. S. 386; *Duradene v. Magruder,* 21 F. Supp. 426 (Md.), affirmed 95 F. (2d) 999 (C. C. A. 4th); *Houbigant, Inc., v. Commissioner,* 31 B. T. A. 954, affirmed 80 Fed. (2d) 1012 (C. C. A. 2d), certiorari denied, 298 U. S. 669. The Government, considering such proof insufficient, objected to the materiality of such statements on the ground that they were not the best evidence to show that the tax had not been passed on [R. 108, 137-138], the best evidence consisting, of course, of the books and records of the sales prices of Pacific during the period in question. Unless a taxpayer meets the specific requirements of the statute, no action can be maintained for the recovery of manufacturers' excise taxes.[19] Section 621(d), Revenue Act of 1932; Art. 71, Regulations 46; *L. T. Piver, Inc., v. Hoey,* 101 F. (2d) 68 (C. C. A. 2d). The taxpayer failed to meet those requirements herein.

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[19]Even in the event of recovery of manufacturers' excise taxes, interest thereon in no case may be allowed. Section 621(c), Revenue Act of 1932. While this section was amended by the Revenue Act of 1935 to allow 6% interest on such recoveries (Sec. 401(c)), the amendment has been held not to apply to payments made for any period prior to October 1, 1935 (S. T. 900, 1940-1 Cum. Bull. 247).

IV.

The Deduction or Credit Against Manufacturers' Excise Taxes Imposed by Section 602 of the 1932 Act, Allowed by Section 9(a) of the Agricultural Adjustment Act on Cotton on Which Processing Taxes Were Imposed and Paid Pursuant to That Section, Does Not Apply Also to Cotton on Which Floor Stocks Taxes Were Imposed and Paid Pursuant to Section 16 of That Act.

During the period here in question Pacific manufactured and sold tires containing approximately 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid a so-called floor stocks tax levied under Section 16 of the Agricultural Adjustment Act at the rate of approximately $.04 per pound. In computing the manufacturers' excise tax imposed at the rate of $.02¼ per pound by Section 602 of the 1932 Act on the manufacture and sale of tires, Pacific took deduction or credit therefrom for the floor stocks tax, already imposed and paid under Section 16, on the cotton contained in the tires although Section 16 makes no provision therefor. The credit or deduction thus taken for floor stocks tax in computing its sales tax under Section 602 was disallowed by the Commissioner of Internal Revenue, and assessment thereof as additional manufacturers' excise tax was made which, upon demand, Pacific paid under protest. Pacific thereupon filed claims therefor which were rejected by the Commissioner on the ground that the proper interpretation of Section 9(a) of the Agricultural Adjustment Act did not entitle Pacific to a credit for floor stocks taxes, previously paid on the cotton content of the tires, in computing the manufacturers' excise tax on the manufacture and sale thereof, and this suit followed.

The court below held that if Section 9(a) is read literally, its provisions restrict the credit against manufacturers' excise taxes to processing taxes alone since the so-called floor stocks taxes imposed but undefined by Section 16, for which no credit is allowed, do not come within the literal terms of Section 9. It stated that such construction, however, is erroneous and would lead to discriminatory taxation as between tire manufacturers and consequently, the several provisions of the Agricultural Adjustment Act and the intent of the Congress considered, and in order to avoid double taxation, the credit allowable under Section 9(a) for processing taxes is also allowable under Section 16(a) for floor stocks taxes and therefore Pacific would have been entitled to recover on the basis of its claims for floor stocks taxes; but, the court continued, the refund here sought is for an erroneously paid manufacturers' excise tax—and was so considered by the Government throughout, as shown by the record [R. 101] —which, under the facts herein, the taxpayer is not entitled to recover (for other reasons hereinbefore dealt with under Points I-III, *supra*). [R. 97-101.]

Inasmuch as the court below decided that Pacific and not the taxpayer was entitled to the claimed credit and the decision for the Government turned on other points previously dealt with, it may not be necessary for the Court to decide this point. If this Court should decide against the Government the other points presented and argued herein, then it is our position that despite the fact that Pacific paid the floor stocks tax on the possession of the cotton, under Section 16 of the Agricultural Adjustment Act, before it was included in the manufacture of the tires, it is nevertheless entitled to no deduction or credit therefor against the excise tax imposed by Section 602 of

the 1932 Act on the completed tires manufactured and sold.

The "processing tax" was, in the case of cotton, a tax on the spinning, manufacturing, or other processing (except ginning) of cotton. The "floor stocks" tax was, in the case of cotton, a tax on floor stocks of articles already processed wholly or in chief value from cotton and held for sale or other disposition by persons (other than retailers) on the date when the "processing" tax first took effect. The "floor stocks" tax was the equivalent in amount to the amount of the "processing" tax which would have been payable had the floor stocks been processed after the effective date of the "processing" tax. Sections 9, 16, Agricultural Adjustment Act. The statute itself supplies the definition for the word "processing," thus, "in the case of cotton, the term 'processing' means the spinning, manufacturing, or other processing (except ginning) of cotton * * *." Section 9(d)(2). Therefore, since the floor stocks tax is not a tax on "the spinning, manufacturing, or other processing" of cotton, it may not properly be characterized as a processing tax within the meaning of the Act.

The processing tax imposed by Section 9(a) is defined as a tax on the processing of articles and that section specifically allows a credit therefor against the sales or excise tax on the completed article when sold, to the extent that the processing taxed article has been included in the finished product. Thus Section 9(a) reads in part as follows:

> * * * That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such

> manufacturers' sales tax shall be computed on the basis of weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

The undefined but so-called floor stocks tax imposed by Section 16, however, is an excise tax on the *possession* of cotton articles held for sale. *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. No provision is made in that section for a credit or deduction therefor, against the sales or excise tax on the finished article containing such "possession" taxed article, to the extent that the initially taxed article was included in the finished product, and none may be read into that section by implication, inference or otherwise merely because it appears in Section 9(a) for processing taxes. To construe the refund or credit provisions of Section 9(a), which specifically allow the credit, so as to include a like refund or credit for floor stocks taxes imposed by Section 16, for which no credit is specified therein, would be adding something entirely new, not in the statute, to the meaning of the word "processing" as it is meant and specified in the statute. This would be contrary to the strict statutory construction required, according to the specific terms of the statute, in cases claiming exemption from taxes, as herein. We are here confronted, not with the imposition of a tax, but with a claim to exemption therefrom, to accomplish which the taxpayer must bring itself clearly within the express terms of the statute. *Helvering v. Northwest Steel Mills*, 311 U. S. 46; *New Colonial Co. v. Helvering*, 292 U. S. 435. This it has failed to do. Moreover, the rule that ambiguities in a taxing statute are to be resolved in favor of the taxpayer, does not apply in determining what the taxpayer may deduct, credits and deductions from gross income being a

matter of legislative grace allowable only where the law clearly provides therefor. *New Colonial Co. v. Helvering, supra; Helvering v. Ins. Co.*, 294 U. S. 686; *Bagnall v. Commissioner*, 96 F. (2d) 956 (C. C. A. 9th).

The distinction between processing taxes and floor stocks taxes is further clearly shown by the treatment thereof in the 1936 Act which provides, among other things, that "no suit or proceeding * * * shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein" (Title VII, Revenue Act of 1936, Section 906(a)), and defines a processing tax as follows: "The term 'processing tax' means any tax or exaction denominated a 'processing' tax under the Agricultural Adjustment Act * * *" (*id.*, Sec. 913(b)). Upon the constitutionality of the provisions of Title VII of that Act being questioned in *Anniston Mfg. Co. v. Davis, supra*, the Supreme Court, upholding the right of Congress to require a taxpayer to present its claim for the recovery of processing taxes before the Board of Review, stated (p. 343):

> With respect to floor stock taxes, no serious question is presented as to the adequacy of the remedy. The remedy by suit is expressly preserved. If the Commissioner refused refund, suit may be brought against the United States in the Court of Claims or in the District Court for the recovery of the amount claimed to have been illegally exacted.

Thus, a claim for the recovery of floor stocks taxes is not subject to the prohibition of Section 906(a) of the 1936 Act forbidding an action to be brought in any court for the recovery of processing taxes, and therefore under the

ruling in the *Anniston Mfg.* case, the term "processing tax," as used in the Agricultural Adjustment Act, does not include the tax on "floor stocks."

It is submitted, therefore, that the precise definition of the term "processing tax" as used in the Agricultural Adjustment Act and the ruling of the Supreme Court in the *Anniston Mfg.* case, together clearly negative any possible contention that the "floor stocks" tax as used in Section 16 of the Agricultural Adjustment Act may be used interchangeably with or in lieu of the "processing tax" as used in Section 9 of that Act, for the purpose of obtaining the credit or deduction claimed herein. Consequently, it follows, we submit, that the deduction or credit against the manufacturers' excise taxes imposed by Section 602 of the 1932 Act herein, allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which processing taxes were imposed and paid pursuant to that section, does not apply also to cotton on which floor stocks taxes were imposed and paid pursuant to Section 16(a) of that Act.

In view of the foregoing, we submit that (1) the assignments of its claims for refund against the United States made by Pacific to the taxpayer were ineffective under Section 3477, Revised Statutes, and therefore the taxpayer could not properly maintain the present action and is not entitled to recover; (2) the taxpayer is not entitled to maintain the instant action and to recover a refund because the grounds relied upon in the claims filed by Pacific with the Collector and alleged in the original petition differ materially from the new and unrelated grounds relied upon in the present suit; (3) the taxpayer is not entitled to recover since it was not "the person who paid the tax," nor has it established by requisite proof

that Pacific, the real taxpayer, did not pass the taxes in question on to its vendees, as required by the statute and regulations in order to recover; and (4) the deduction or credit, against manufacturers' excise taxes imposed by Section 602 of the 1932 Act, allowed by Section 9(a) of the Agricultural Adjustment Act on cotton on which processing taxes were imposed and paid pursuant to that section, does not apply also to cotton on which floor stocks taxes were imposed and paid pursuant to Section 16 of that Act.

Conclusion.

The judgment of the District Court is correct and in accordance with law and controlling authority. It should therefore be affirmed.

Respectfully submitted,

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August, 1942.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

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SEC. 621. CREDITS AND REFUNDS.

* * * * * * * *

(c) In no case shall interest be allowed with respect to any amount of tax under this title credited or refunded.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 24, 48 Stat. 31:

SEC. 9. (a) To obtain revenue from extraordinary expenses incurred by reason of the national eco-

nomic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * * * * * *

(U. S. C. 1940, ed., Title 7, Sec. 609.)

SEC. 16(a). Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

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(U. S. C. 1940 ed., Title 7, Sec. 616.)

Revised Statutes, as amended:

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of

a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. (U. S. C. 1940 ed., Title 31, Sec. 203.)

Treasury Regulations 46, promulgated under the Revenue Act of 1932:

ART. 71. *Credits and refunds.*— * * * The claim for credit or refund must be supported by evidence showing (1) the person who paid to the United States the tax for which credit or refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used.

* * * * * * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing

(1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * * * * *

a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. (U. S. C. 1940 ed., Title 31, Sec. 203.)

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